KOK HO TEIK & ANOR.
v.
YEAP LEAN SENG & ORS.

[Orig. Civ. Juris. (Spenser Wilkinson, J.) October 10, 1952]

[Penang — Motion in Civil Suit No. 267 of 1949]

Practice and procedure — Costs — Application for payment after favourable result of appeal in which applicant was not a party although he was a party at the trial.

This was an application to the High Court by one of six defendants to have his costs paid by the plaintiff following the favourable result of an appeal to the Court of Appeal by the other five defendants. At the trial of the suit judgment (reported in (1951) M.L.J. 77) was entered for the plaintiff and the five defendants, excluding the applicant, were ordered to pay plaintiff's costs. The applicant was ordered to pay his own costs. Against this judgment the five defendants appealed; the applicant did not join in the appeal. The appeal was allowed, and judgments of the Court of Appeal (reported in (1951) M.L.J. 235) were read by a single Judge. The applicant, after this reading of the judgments, asked for his costs and the Judge of the Court of Appeal refused to make any order.

Held: (1) once the Court of Appeal has heard and determined the appeal there is nothing pending and section 18 of the Courts Ordinance does not give any power to a single Judge of the Court of Appeal to deal with any consequential questions that may arise out of the written judgments. The proper course would be for the applicant to apply to the next full Court of Appeal for leave to appeal; (2) since there has been no appeal against the order of the trial Judge, that order still stands and the High Court has no power to vary it.

Case referred to:—

(1) *In re Whiston, Whiston v. Woolley* (1924) 1 Ch. 122.

MOTION.

F. G. Pooley for the plaintiffs.

Ong Huck Lim for the 5th defendant-applicant.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — This application raises some interesting and difficult points. It arises out of the judgment of Jobling, J. delivered in this Suit on the 18th January, 1951, in which judgment was given for the plaintiffs with costs against 1st, 2nd, 4th and 6th defendants, the 5th defendant being ordered to pay his own costs. From that judgment the 1st, 2nd, 4th and 6th defendants appealed. The 5th defendant who was concerned in the proceedings in his capacity as Public Trustee during the Japanese occupation did not appeal. The appeal came on for hearing at Penang in September, 1951 and at the conclusion of the hearing judgment was reserved. On the 19th November, 1951 I delivered the written judgments of the Court of Appeal unanimously allowing the appeal with costs in the Court of Appeal and in the Court below.

When the judgments had been read Mr. Ong Huck Lim on behalf of the 5th defendant asked for an order in regard to the costs of the 5th defendant. Mr. Pooley for the respondents objected that the 5th defendant was not before the Court and could not be heard. I acceded to Mr. Pooley's argument and refused to make any order.

No further steps were taken by the 5th defendant for some time presumably because an appeal was pending from the decision of the Court of Appeal to the Privy Council. The latter appeal having been withdrawn the 5th defendant filed this application for an order that the plaintiffs in the Court below should pay the costs of the 5th defendant in view of the decision of the Court of Appeal. Mr. Ong Huck Lim argued that had the decision of the learned trial Judge been the other way, as it now appears it should have been, the costs would have followed the event and the plaintiffs would have been ordered to pay the costs of all the defendants; and that as the judgment of the trial Judge ordering the 5th defendant to pay his own costs had now been set aside it was open to me to make an order in regard to those costs.

It was contended by Mr. Pooley, however, on behalf of the plaintiffs, that the Court had no jurisdiction to entertain this application. He argued that if the 5th defendant was dissatisfied as to the order relating to costs he should have joined in the appeal for this purpose. He contended that no relief was ever claimed in the action against the 5th defendant so that he attended the proceedings in the Court of first instance at his own risk and not having appealed against the judgment it was now too late for him to take advantage of the result of the appeal. He further pointed out that the Court of Appeal had not remitted any part of the case to the High Court for further consideration or consequential orders and that the High Court therefore had no jurisdiction in the matter.

Although it is perhaps not strictly relevant to the application now before me I think it right to revert to my refusal as a single Judge of the Court of Appeal to hear the 5th defendant's application in order to see what remedies, if any, were or are open to the 5th defendant in this matter. It appears to me that even if I was wrong in not hearing the 5th defendant in the Court of Appeal it was still not possible at that stage of the proceedings for the 5th defendant to apply for any order as to costs to a single Judge of that Court. Section 18 of the Courts Ordinance is the only section which gives powers to a single Judge of the Court of

NOTE: The judgment of Jobling, J., is reported in (1951) M.L.J. 77, and the judgments of the Court of Appeal in (1951) M.L.J. 235. — *Ed. M.L.J.*

Appeal and that section refers only to a civil or criminal proceeding "pending" before the Court of Appeal. In my opinion once the Court of Appeal has heard and determined the appeal there is nothing pending and I do not think that the wording of the section is apt to give any powers to a single Judge of the Court of Appeal once the appeal has been heard. It is perhaps unfortunate that in this country where the Court of Appeal does not sit continuously and where reserved judgments are often delivered in the absence of the Judges who decided the appeal we have followed so closely the wording of the equivalent English rule which seems to me to be designed mainly for matters arising during the Court Vacation. In England (apart from the Vacation) the Court of Appeal sits continuously and, normally, reserved judgments are delivered by the Lords Justices themselves, who being then present can deal at once with any consequential matters which may arise out of their written judgments. However this may be, it appears to me that in this country no power has been given to a single Judge of the Court of Appeal to deal with any consequential questions that may arise out of the written judgments — and by consequential questions I mean, here, questions arising which admit of more than one possible answer, not ancillary matters that follow as of course. I conclude, therefore, that any application which the 5th defendant might wish to make to the Court of Appeal, after the judgments had been delivered, should have been made to the full Court.

I return now to the question before me which is whether there is any power in the High Court to deal with this matter. It was suggested during the course of the arguments that the formal judgment of the Court of Appeal had the result of setting aside the judgment of the High Court for all purposes. The relevant part of the formal order of the Court of Appeal reads as follows :—

> "It is ordered that this appeal be allowed and that the Judgment of the Honourable Mr. Justice Jobling dated the 18th day of January, 1951 be set aside and that the claim of the plaintiffs (respondents) in this Suit against the present defendants (appellants) be dismissed with costs here and in the Court below such costs to be taxed and when taxed be paid to the appellants by the respondents."

I think the wording of the formal judgment must be read in the light of the heading and of the parties thereto and that the judgment of the Court below is thus set aside only as between the parties to the judgment of the Court of Appeal. Moreover, the words "against the present defendant-appellants" make it clear that the costs of the defendant who was not an appellant were not being dealt with. Even if I am wrong as to this, I do not think that the interpretation suggested could assist the applicant for if the whole of the judgment of the learned trial Judge is set aside for all purposes then, although the order that the 5th defendant should pay his own costs will have gone, he would still be left without any order for his costs to be paid. I am unable to see how, sitting as a Judge of the High Court, I have any jurisdiction in the present state of these proceedings to make any order as to the costs of the 5th defendant because I cannot see how such an issue can be before me for decision. The action has been decided and, in so far as the Court of first instance is concerned, is at an end; the appeal has been decided and that is also, as far as the High Court is concerned, at an end. In my opinion the true view of the position is that, in so far as the judgment of the trial Judge ordered the 5th defendant to pay his own costs, there has been no appeal against that order so that it still stands and I have no power to vary it.

Counsel were unable to cite any authority which might be of assistance in arriving at a decision in this application but it seems to me that some assistance is to be derived from the case of *In re Whiston, Whiston v. Woolley*[1]. The facts of that case are not relevant to the matter now before me but the following passage from the judgment of Sargent, L.J., in that case appears to me to be of assistance :—

> "I see that there is no appeal by the heir at law, who was the person really prejudiced, against a decision which deprived him of his special rights in the real estate, but I suggest the proper way would be that we should give leave to the heir at law to appeal, notwithstanding that the time may have elapsed. I remember one or two cases where beneficiaries under a trust who were on the same footing had a decision given against them, and there was an appeal to this Court only by one or two of the beneficiaries and not by all, and the Court .....
> .....
> went on to say that although the other beneficiaries had not appealed, it must necessarily follow from the construction put by the Court on the trusts that they would, in the result, get the benefit of the appeal, although they had not run the risk of the appeal."

The report continues :—

> "At the conclusion of the judgments the Court after some discussion gave leave to the heir at law to appeal
> ....."

Although the situation in that case was not quite on all fours with that in the present case it seems to me to give a very clear indication of the course which the 5th defendant might have taken in this case. Leave to appeal out of time can be given only by special leave of the full Court of Appeal. As soon, therefore, as the judgment of the Court of Appeal in this case was known it would have been open to the 5th defendant to apply to the full Court of Appeal at its next sitting, wherever that might be, for leave to appeal against that part of the judgment of Jobling, J., which dealt with the 5th defendant's costs. Whether such an application would or would not have been successful

is a matter on which I express no opinion, though I do not think it would be improper for me to say that as a member of the Court which decided the appeal in this case I am of opinion that such an application would at least have considerable merits. As far as I can see this course still remains open to the 5th defendant.

The course which was adopted by the Court of Appeal in the case of *Whiston v. Woolley*[1] confirms me in my view that the High Court has no power to vary this order. It seems clear that the Court of Appeal thought it necessary in that case for the heir at law to appeal before he could obtain the benefit of their judgment. If leave to appeal were asked for in this case the Court of Appeal might take the view that the 5th defendant ought to have the benefit of their judgment or they might take the view that as he had not chosen to appeal he should not be allowed that benefit. The question therefore appears to me to be eminently one for the full Court of Appeal.

For the reasons I have given I have come to the conclusion that I have no power to make any order in regard to the 5th defendant's costs in the action and that as the matter stands at present the 5th defendant, having elected not to appeal, I must hold him bound by that election.

Mr. Ong Huck Lim on behalf of the 5th defendant requested that in case my decision on this application should be against him he be given leave to appeal and I give leave accordingly; but I think it right that I should intimate that the 5th defendant would in my opinion be well advised to consider whether the better course would not be to apply to the Court of Appeal for leave to appeal against the judgment of Jobling, J., in the manner that was allowed to the heir at law in the case of *Whiston v. Woolley*[1]. He might think it well to pursue both alternatives simultaneously, but I express no opinion as to that.

This application must be dismissed with costs.

Application dismissed.

LIEW CHIN SEONG v. REX.

[App. Crim. Juris. (Sir Charles Murray-Aynsley, C.J.) May 7, 1952]

[Singapore — Magistrate's Appeal No. 208 of 1951]

Criminal trial — Criminal Law and Procedure — Defence of alibi — Duty of Magistrate to consider.

The appellant, a police detective, was charged with extorting $80 from the complainant and was convicted and senteneed to 4 months rigorous imprisonment. The story for the prosecution was that the appellant went to the complainant who kept an ice-water stall at Boat Quay near Whiteaways Laidlaw's shop on July 16, 1951 and extorted $80 from the complainant. The prosecution called 3 alleged eye-witnesses. One of them gave the time for the alleged offence as 10.30 a.m., another as 10.00 a.m., and the 3rd as "past 10.00 a.m." Against that the appellant established that he was in the Central Police Station from 8.25 a.m. until 10.20 a.m. At that time he had to take a supervisee to Beach Road Police Station where he reached at 10.30 a.m. It took him 20 minutes to hand over the supervisee. The learned Magistrate in his grounds of judgment, inter alia, said: "If the accused's alibi accounted for the whole of his time between 10 and 11 on that morning, I should consider that it disproved the prosecution case."

Held: the learned Magistrate should have considered whether the evidence for the defence did not produce a reasonable doubt.

MAGISTRATE'S APPEAL.

K. A. Seth and *D. S. Marshall* for the appellant.

A. V. Winslow (Crown Counsel) for the respondent.

Sir Charles Murray-Aynlsey, C.J. : — In this case the appellant, a detective corporal, had been convicted on a charge under section 384 of the Penal Code. At the trial he had produced an *alibi*. There were three alleged eye-witnesses produced for the prosecution. One of them gave the time for the alleged offence as 10.30 a.m., another as about 10 a.m., the third as "past 10 a.m;" against that the appellant established that he was in the Central Police Station from 8.25 a.m. until 10.20 a.m. At that time he had to take a supervisee to Beach Road Police Station and there hand him over. A Police witness estimated the time required for handing over as 10 to 15 minutes. The alleged offence took place in Battery Road. The defence produced a further *alibi*, which seems to have been accepted by the Magistrate, from 11 a.m. onwards at a coffee shop in Merchant Street. The Magistrate said of this: "If the accused's *alibi* accounted for the whole of his time between 10 and 11 on that morning, I should have considered that it disproved the prosecution case.

In the circumstances I think that the learned Magistrate should have considered whether the evidence for the defence did not produce a reasonable doubt. In the circumstances I allowed the appeal and quashed the conviction.

Appeal allowed.
Conviction quashed.